



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL SUIT NO. 61 OF 2016

DIXON KIBAGENDI

JORAM KIILU.....PLAINTIFFS

VERSUS

HARRY P. ARIGI

FREDRICK OYUGI

JOAN ZAWADI KAVEMA

MAURICE MILIMU AMAWA (Sued on their own behalf and on

behalf of their predecessors and or successors in title in their

capacity as the Registered Trustees of the Kenya Ports Authority

Retirement Benefits Scheme 2012 (Defined Contribution)...DEFENDANTS

AND

KENYA PORTS AUTHORITY.....1ST INTERESTED PARTY

KENYA RETIREMENT BENEFITS AUTHORITY.....2ND INTERESTED PARTY

RULING

1. On 28th June, 2016 the defendants (applicants) and the 2nd interested party filed a Notice of Motion under the provisions of Section 6 of the Arbitration Act, Sections 1A and 1B of the Civil Procedure Act and Order 51 Rule 1 of the Civil Procedure Rules for orders that:-

- i. The proceedings herein be stayed pending reference of the dispute to arbitration as envisaged under clause 33 of the Trust Deed and Rules dated 24th October, 2012;
- ii. The dispute herein be referred to arbitration pursuant to Clause 33 of the Trust Deed and Rules dated 24th October, 2012; and

iii. Costs be borne by the plaintiffs.

2. The application is supported by the affidavit of Harry P. Arigi, the Chairman Kenya Ports Authority Retirement Benefits Scheme 2012 (Defined Contribution) filed on 28th June, 2016. The respondents/plaintiffs on 18th July, 2016 filed a replying affidavit to the said application.

3. Counsel for the 1st interested party filed a Notice of appointment on 29th June, 2016 but filed no response to the instant application. Counsel for the applicants and the respondents thereafter filed written submissions. Mr. Khagram for the 1st interested party informed the court that he was supporting the application dated 28th June, 2016 and fully relied on the written submissions by Counsel for the applicants. The Court undertook to peruse the written submissions and deliver its ruling.

APPLICANTS' SUBMISSIONS

4. In his written submissions, Mr. Wafula Learned Counsel for the applicants referred the Court to Section 33 of the Trust Deed and Rules of the Kenya Ports Authority Retirement Benefits Scheme, 2012 (KPA RB Scheme, 2012) dated 24th October, 2012. He indicated that the said provisions for arbitration are drafted in mandatory terms and that the respondents in this case are described as members of the scheme in the amended plaint filed on 13th July, 2016. Counsel further submitted that the issues in controversy as per the respondents amended plaint touch on the elections held on 3rd June, 2016 and the Annual General Meeting held on 21st May, 2016 which the respondents seek nullification of. There are also issues of the management of the KPA RB Scheme, 2012. According to Mr. Wafula, the foregoing issues are provided for and touch on the Trust Deed and fall within the realm of clause 33 of the said Deed.

5. The Court's attention was drawn to Section 6 of the Arbitration Act which empowers courts to refer parties to arbitration within certain parameters. Mr. Wafula also cited the provisions of article 159 (2) (c) of the Constitution of Kenya that stipulates that in exercising judicial authority, Courts shall subject to clause (3) promote alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms.

6. Counsel also relied on the provisions of Section 59(c) of the Civil Procedure Act, Cap 21, Laws of Kenya which state that any suit may be referred to any other method of dispute resolution where the parties agree or the court considers the case suitable for such referral. He also cited the provisions of Order 46 rule 20(1) of the Civil Procedure Rules on alternative dispute resolution, aimed at the attainment of the overriding objective envisaged under Sections 1A and 1B of the Civil Procedure Act. Mr. Wafula prayed for the application to be allowed.

RESPONDENTS' SUBMISSIONS

7. Ms. Kariuki, Learned Counsel for the respondents indicated in her written submissions that the applicants whom she has erroneously referred to as the respondents, have not demonstrated good will and despite the applicants being served with countless demand letters, they did not address the available option of arbitration. It was only after being sued that they are now referring to arbitration as an afterthought. Counsel further argued that there is conflict of interest in that the Advocate representing the applicants was involved in the land transaction which forms part of the issues in the suit herein. She submitted that the respondents are apprehensive of any attempt to refer the matter to arbitration as it involves misappropriation of funds by both the applicants and their Advocates who received the money which they were holding in trust, in spite of a court order requiring them to refund the funds to members.

8. Ms. Kariuki submitted that the ability of a party to institute a suit is inherent on that party and is entrenched in the Constitution which is the supreme law. In addition, an arbitration award is final and binding on the parties who have no right to appeal, whereas a court process allows a party dissatisfied with a suit to appeal. The respondents are thus highly opposed to the arbitration process.

9. Counsel was of the view that having the suit heard would be more expeditious as compared to an arbitral process which they feel will be highly compromised. She stated that the instant application is meant to defeat an application that had been filed by the respondents seeking injunctive orders and delay the process to allow for continued embezzlement of funds as no statements of accounts or audited accounts had been rendered. Ms. Kariuki prayed for the application to be dismissed with costs.

ANALYSIS AND DETERMINATION

The issue for determination is if this court should stay the proceedings herein and refer the dispute to arbitration.

10. The factors that moved the respondents to file the suit herein can be gleaned from paragraphs 7 and 8 of the amended plaint where the respondents state that on or about 16th May, 2016 the applicants circulated a notice to its members informing them that they would convene an Annual General Meeting on 21st May, 2016. The respondents aver that the meeting was held as scheduled without paying due regard to their request for the applicants to render books of account for the pension scheme.

11. In paragraph 12 of the said plaint, the respondents state that the applicants have been conducting suspicious transactions for which members have sought answers from the applicants and the 1st and 2nd interested parties but are yet to receive any information with regard to transactions leading to purchase of land carved out of parcel No. CR.14107 situate at South of Takaungu in Kilifi.

12. In paragraph 13 of the amended plaint, the respondents aver that the applicants acting in their powers of investment under clause 20 of the Deed, purchased land at an exaggerated purchase price that was given as Kshs.7,000,000/= per acre in an area where an acre of land is sold at Kshs.250,000/=. The respondents further aver that although the said transaction has since been stopped vide constitutional petition No. 24 of 2015 by the 1st Interested party, the money paid out as deposit at the sum of Kshs.70,000,000/= has not been refunded to the scheme.

13. In paragraph 14 of the said amended plaint the respondents state that on several occasions they have written to the applicants and the interested party seeking to have the trustees give a record and account for all the dealings of the land transaction and the general investment of the defined contribution pension scheme but the said communication has elicited no reaction thus breaching the statutory duty of care owed to its members.

14. The prayers sought in the amended plaint are for judgment to be entered against the defendant for:-

- a. nullification of the elections held on 3rd June, 2016;
- b. nullification of the Annual General Meeting held on 21st May, 2016;
- c. production of minutes of the Annual General Meeting and render audited accounts as at 21st May, 2016;
- d. restraining the defendants from any other dealing with the fund and/or transacting on behalf of the members of Kenya Ports Authority Retirement Benefits Scheme 2012 (Defined Contribution);
- e. calling for new elections;
- f. rendering books of account and statement for the pension scheme fund as highlighted in paragraphs 8 and 10 of the plaint;
- g. rendering books of account or funds collected towards purchase of land as highlighted in paragraph 7 of the plaint;

- h. refunding for the purchase in (g) above be done through their advocate's/client's account;
- i. costs and interest of the suit; and
- j. any other relief that this Honourable court may deem fit to grant.

15. I have deemed it necessary to highlight the foregoing paragraphs from the amended plaint with a view of ascertaining the nexus between the Trust Deed and Rules of the KPA RB Scheme, 2012 and the pleadings in the main suit. Clause 6 of the Trust Deed and Rules under the heading of composition of the scheme provides thus:-

***“The assets of the scheme shall consist of all contributions paid to the Trustees by the Founder and the members and any other sums received by the Trustees for the purposes of the scheme and the Trustees shall hold such contributions and money and investments for the time being representing the same and the income therefrom in accordance with the provisions hereof and the Rules for the respective persons for whose benefit such benefits are under the Rules expressed to be payable”.* (emphasis added)**

16. Clause 11 of the said Trust Deed and Rules makes provision for the Trustees to keep proper books and records of account. The clause places an obligation on the said Trustees to cause to be prepared and furnished to the Founder an audited account of all transactions and matters as the Founder may from time to time determine.

17. Clause 12(a)(v) of the said Trust Deed and Rules provides that the Trust Secretary shall keep minutes of all meetings of the Trustees and the exercise by the Trustees of all powers and discretions vested in them and the passing of resolutions shall be recorded in such minutes.

18. The Trust Deed and Rules in paragraph 12(b)(vi) gives the Trustees the powers to convene an annual general meeting of the members not later than 31st December in each year. It is during such meetings that a report of any changes to the benefit or contribution structure of the scheme, audited accounts, investments, remuneration of Trustees and appointment and removal of Trustees, should be presented.

19. Clause 14 of the said Trust Deed and Rules provides for the election and removal of any trustee or trustees by the members.

20. It is thus evident that the issues that form the subject of the amended plaint herein are well covered in the Trust Deed and Rules of the KPA RB scheme, 2012. The mode of addressing disputes that may arise in the administration of the said retirement benefits scheme are addressed under clause 33 of the said Deed and Rules which makes provision for arbitration. The clause states as follows:-

"Save where the decision of the Trustees is final under the provisions of this Deed, if at any time hereafter any dispute, difference or question shall arise between the Founder, the Trustees, the Members, the Members' Dependants or other persons or their personal representatives or any of them respectively touching the construction, meaning or effect of this Deed or any cause or thing therein contained or the rights and liabilities of any of them under this Deed or otherwise howsoever in relation to the Scheme then every such dispute or question shall (to the extent that it cannot be resolved amicably by the parties) be referred to arbitration by a single arbitrator appointed by agreement between the parties and in default of such agreement by the then Chairman for the time being of the Chartered Institute of Arbitrators, Kenya Branch and the result of which arbitration shall be final and binding upon all parties and the proceedings shall be regulated by the provisions of the Arbitration Act or any law or instrument amending, extending or replacing the Act."

21. One of the issues that the respondents have brought forth in their amended plaint is the manner in which the Trustees have expended the funds of the scheme by undertaking to purchase a parcel of land at

Takaungu in Kilifi County at an exorbitant price as compared to other parcels of land within the same locality. Clause 20 of the KPA RB Scheme, 2012, Trust Deed and Rules makes provisions for Trustees powers of investments in the following terms:-

"Subject to the RBA, the trustees may invest any money forming part of the Scheme in the purchase of or at interest upon the security of such stocks, funds, shares and securities or property of whatever nature and wheresoever situate (and without prejudice to the generality of the foregoing to purchase, take on, or lease any real freehold leasehold or any other immovable property and to sell, let or otherwise deal in the same) as the Trustees shall in their absolute discretion think fit to the intent that Trustees shall have the same full and unrestricted powers of investing and transposing investments in all respects as if they were absolutely entitled thereto beneficially Provided Always That no investments shall be made in contravention of the investment guidelines or other requirements from time to time issued or stipulated by the Authority."

22. In the case of **Emmanuel Titus Maundu & 2 Others vs Registered Trustees of the Kenya Ports Authority Pension Scheme** [2011] eKLR, a complaint was raised by members of the said scheme on administration of the scheme which required Trustees to take reasonable care to ensure that the scheme was managed in the best interests of the members. The trustees therein were required to prepare annual accounts, to be audited, to avail proper investment and have actuarial reports prepared which were to be availed to members, at the latest, within six months of the financial year. On the issue of the aforesaid case being referred to arbitration, Ojwang J. (as he then was) stated thus:-

"Precisely on account of the assets comprised in the trust, and the delicate interests therein of plaintiffs who have made their contributions from a plurality of sources over time, this is a matter in which a first solution through arbitration will be most appropriate."

23. This court notes that the provisions of clause 33 of the Trust Deed and Rules of the KPA RB scheme, 2012 provide that any dispute or question referred to arbitration shall be by **a single arbitrator appointed by agreement between the parties.** The said provisions therefore show that the respondents would, if the instant case is referred to arbitration, have an equal opportunity as the applicants to select an Arbitrator of their choice. The respondents Counsel's apprehension that the arbitration process will be comprised is unfounded. Any issues of conflict of interest can be addressed during an arbitral process. In addition, arbitration will be a faster means of disposal of the questions in issue. It is my finding that in view of the elaborate provisions under Clause 33 of the said KPA RB scheme, 2012, Trust Deed and Rules, the dispute herein will be best resolved by way of arbitration.

24. Section 6(1) of the Arbitration Act stipulates as follows:-

"(1) A court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than the time when that party enters appearance or otherwise acknowledges the claim against which the stay of proceedings is sought, stay the proceedings and refer the parties to arbitration unless it finds-

(a) that the arbitration agreement is null and void, inoperative or incapable of being performed;
or

(b) that there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration."

25. The matters that are in dispute in the present case revolve around the investments and the management of the KPA RB Scheme, 2012. As earlier indicated in this ruling, the first port of call is to be found in the provisions of clause 33 of the Trust Deed and Rules of the said scheme. Secondly, this court is empowered by the provisions of Section 59(C) of the Civil Procedure Act to refer the dispute to arbitration. The provisions therein provide:-

"(1) a suit may be referred to any other method of dispute resolution where the parties agree or the Court considers the case suitable for such referral. (emphasis added)

(2) Any other method of alternative dispute resolution shall be governed by such procedure as the parties themselves agree to or as the court may, in its discretion order.

(3) Any settlement arising from a suit referred to any other alternative dispute resolution method by the Court or agreement of the parties shall be enforceable as a judgment of the Court.

(4) No appeal shall lie in respect of any judgment entered under this section."

28. This court also takes cognizance of the provisions of article 159(2)(c) of the Constitution of Kenya on the principles that guide the courts in the exercise of judicial authority, and in particular, that alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted subject to clause (3) thereof. I hereby make the following orders:-

- i. The application dated 28th June, 2016 is hereby allowed;
- ii. The parties shall within 21 days from today, draw and agree on the issues for arbitration;
- iii. The parties shall thereafter, within 14 days, make arrangements for an Arbitrator to consider and make a determination of the issues in dispute;
- iv. This matter will be mentioned on 6th March, 2017; and
- v. Each party shall bear its own costs.

DELIVERED, DATED and SIGNED at MOMBASA on this 9th day of February, 2017.

NJOKI MWANGI

JUDGE

In the presence of:-

Mr. Wafula for the defendants/applicants and the 2nd Interested Party

Ms Kariuki for the plaintiff/respondent

No appearance for the 1st Interested Party

Court Assistant - Oliver Musundi